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 United States of America

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR0802-JAH
	)	
Plaintiff,	)	DATE: April 21, 2007
	)	TIME: 8:30 a.m.
v.	)	
	)	UNITED STATES' RESPONSE AND
JOSE JUAN FERNANDEZ,	)	OPPOSITION TO DEFENDANT'S MOTIONS
	)	TO:
Defendant.	)	
	)	(1) COMPEL DISCOVERY/
	)	PRESERVE EVIDENCE; AND
	)	(2) GRANT LEAVE TO FILE FURTHER
	)	MOTIONS.
	)	
	)	TOGETHER WITH STATEMENT OF FACTS
	)	AND MEMORANDUM OF POINTS AND
	)	AUTHORITIES
	)	

COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel,  
 KAREN P. HEWITT, United States Attorney, and Paul L. Starita, Assistant United States Attorney, and  
 hereby files its Response and Opposition to the defendant's above-referenced motions together with  
 Statement of Facts and Memorandum of Points and Authorities. This Response and Opposition is based  
 upon the files and records of the case.

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**I****STATEMENT OF THE CASE**

On March 19, 2008, a federal grand jury in the Southern District of California returned a two-count Indictment charging defendant JOSE JUAN FERNANDEZ (“Defendant”) with (i) importing approximately 52.40 kilograms (115.28 pounds) of marijuana into the United States in violation of 21 U.S.C. §§ 952 and 960, and (ii) possessing approximately 52.40 kilograms (115.28 pounds) of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(2). Defendant was arraigned on the Indictment on March 20, 2008, and pleaded not guilty.

**II****STATEMENT OF THE FACTS****A. PRIMARY INSPECTION AREA**

On March 5, 2008, at approximately 6:30 a.m., Defendant, the driver and sole occupant of a 1986 Toyota pick-up truck bearing California license plates (# 4EWU768), attempted to enter the United States from Mexico through the Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”) lane number three at the San Ysidro, California, Port of Entry. Since Defendant was not authorized to use the SENTRI lanes, he was redirected to the standard primary inspection lanes. When Defendant arrived at the primary booth, he presented his I-551 Lawful Permanent Resident (“LPR”) card to Customs and Border Protection (“CBP”) Officer Exconde. CBP Officer Exconde explained to Defendant that he was not authorized to use the SENTRI lanes and referred Defendant and his vehicle to the Secondary Inspection Area for further processing.

**B. SECONDARY INSPECTION AREA**

After arriving in the Secondary Inspection Area, Defendant presented his LPR card to CBP Officer Boutwell who asked Defendant a series of standard questions. Defendant stated that he was the owner of the Toyota pick-up truck, that he had bought the truck a couple of days before, and that he had nothing to declare. Upon inspection of the vehicle registration provided by Defendant, CBP Officer Boutwell believed it to be altered or counterfeit. As such, CBP Officer Boutwell requested that a narcotics detection dog screen Defendant’s truck. The narcotics detection dog screened the truck and alerted to the front wall of the bed of the truck. CBP Officer Boutwell then lifted the camper shell off

1 the bed of the truck and discovered a non-factory compartment containing cellophane wrapped  
2 packages. CBP Officer Garza completed the inspection of Defendant's truck and found 11 cellophane  
3 wrapped packages concealed in the non-factory compartment and 4 additional cellophane wrapped  
4 packages concealed in the camper shell. CBP Officer Garza probed one of the packages and found a  
5 green leafy substance. This substance field tested positive for the presence of marijuana.

6 Later this same morning, at approximately 8:55 a.m., CBP Officer Garza had a towing company  
7 contractor remove the rear tires from Defendant's truck for further inspection. The rear tires of the truck  
8 were cut open revealing 10 additional cellophane wrapped packages (5 in each tire). CBP Officers  
9 found a total of 25 packages which were all wrapped in duct tape, cellophane, grease or oil, packaging  
10 tape, and wrapping paper with Kyocera tape (depicting flowers). The total weight of these packages was  
11 approximately 52.40 kilograms (115.28 pounds).

12 **C. DEFENDANT'S POST-MIRANDA STATEMENT**

13 On this same day, at approximately 9:58 a.m., Immigration and Customs Enforcement ("ICE")  
14 Special Agent Roberts advised Defendant that marijuana had been found in his truck and that he was  
15 under arrest. Special Agent Roberts then advised Defendant of his Miranda rights in the English  
16 language with the assistance of an acknowledgment and waiver of rights form. Defendant stated that  
17 he understood his rights and was willing to answer questions. Defendant then appeared to not  
18 understand the term "waiver" on the rights waiver form. The term was explained to Defendant and he  
19 invoked his right to counsel. At this point, all questioning of Defendant ceased. The advisement of  
20 rights and Defendant's invocation were memorialized on a digital video disk ("DVD").

21 **III**

22 **POINTS AND AUTHORITIES**

23 **A. PRODUCTION OF DISCOVERY AND PRESERVATION OF EVIDENCE**

24 The United States has and will continue to fully comply with its discovery obligations under  
25 Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Rule 16 of the Federal  
26 Rules of Criminal Procedure. To date, the United States has produced 71 pages of discovery and a DVD  
27 of Defendant's post-arrest interview.

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1           **1. Defendant's Statements**

2           The United States will disclose to Defendant the substance of any relevant oral statement made  
3 by Defendant, before or after arrest, in response to interrogation by a person Defendant knew was a  
4 government agent if the United States intends to use the statement at trial. The United States will also  
5 disclose and make available for inspection, copying or photographing the following: (1) any relevant  
6 written or recorded statement by the defendant if the statement is within the United States' possession,  
7 custody, or control, and the attorney for the United States knows--or through due diligence could know--  
8 -that the statement exists,<sup>1/</sup> (2) that portion of any written record containing the substance of any relevant  
9 oral statement made before or after arrest if Defendant made the statement in response to interrogation  
10 by a person Defendant knew was a government agent, and (3) Defendant's recorded testimony before  
11 a grand jury relating to the charged offense, if any.

12           **2. Arrest Reports and Notes**

13           The United States has already produced to Defendant all reports and notes known to the United  
14 States relating to Defendant's arrest in this case and will continue to comply with its discovery  
15 obligations.

16           **3. Brady Material**

17           The United States has complied and will continue to comply with its discovery obligations under  
18 Brady v. Maryland, 373 U.S. 83 (1963).

19           **4. Prior Record**

20           The United States has provided Defendant with a copy of Defendant's known prior criminal  
21 record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir.  
22 1990). Should the United States determine that there are any additional documents pertaining to  
23 Defendant's prior criminal record, those will be promptly provided to Defendant.

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27           <sup>1/</sup> However, "the Government is not obligated by Rule 16(a) to anticipate every possible  
28 defense, assume what the defendant's trial testimony...will be, and then furnish the defendant with  
otherwise irrelevant material that might conflict with the defendant's testimony." United States v.  
Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994) (citation omitted).

1           **5.     404(b) Material**

2           The United States will disclose, in advance of trial, the general nature of any “other bad acts”  
3 evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

4           **6.     Evidence Seized**

5           The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing  
6 Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that  
7 is within its possession, custody, or control, and that is either material to the preparation of Defendant’s  
8 defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was  
9 obtained from or belongs to Defendant.

10          **7.     Preservation of Evidence**

11          The United States has no opposition to a preservation order.

12          **8.     Tangible Objects**

13          The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing  
14 Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that  
15 are within its possession, custody, or control, and that is either material to the preparation of Defendant’s  
16 defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was  
17 obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence  
18 in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

19          **9.     Witnesses**

20          The United States will provide a list of witnesses in its trial memorandum, including law  
21 enforcement witnesses. The grand jury transcript of any person who will testify at trial will also be  
22 produced.

23          **10.    Jencks Act Material**

24          The United States will comply with its discovery obligations under the Jencks Act, Title 18,  
25 United States Code, Section 3500, and as incorporated in Rule 26.2.

26          **11.    Giglio Material**

27          The United States has complied and will continue to comply with its discovery obligations under  
28 Giglio v. United States, 405 U.S. 150 (1972).

1           **12.     Reports of Examinations and Tests**

2           The United States will provide Defendant with any scientific tests or examinations in accordance  
3 with Rule 16(a)(1)(F).

4           **13.     Henthorn Material**

5           The United States will comply with its obligations under United States v. Henthorn, 931 F.2d  
6 29 (9th Cir. 1991), and request that all federal agencies involved in the criminal investigation and  
7 prosecution review the personnel files of the federal law enforcement inspectors, officers, and special  
8 agents whom the United States intends to call at trial and disclose information favorable to the defense  
9 that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir.  
10 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the undersigned  
11 Assistant U.S. Attorney is uncertain whether certain incriminating information in the personnel files is  
12 “material,” the information will be submitted to the Court for an in camera inspection and review.

13           **14.     Cooperating Witnesses**

14           At this time, the United States is not aware of any confidential informants or cooperating  
15 witnesses involved in this case. The Government must generally disclose the identity of informants  
16 where: (1) the informant is a material witness, and (2) the informant’s testimony is crucial to the  
17 defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved  
18 in this case, the Court may, in some circumstances, be required to conduct an in camera inspection to  
19 determine whether disclosure of the informant’s identity is required under Roviaro. See United States  
20 v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is  
21 a confidential informant or cooperating witness who is a material witness with evidence helpful to the  
22 defense or essential to a fair determination in this case, the United States will either disclose the identity  
23 of the informant or submit the informant’s identity to the Court for an in camera inspection.

24           **15.     Expert Witnesses**

25           The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written  
26 summary of any expert testimony that the United States intends to use during its case-in-chief at trial  
27 under Federal Rules of Evidence 702, 703 or 705.

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1 **B. LEAVE TO FILE FURTHER MOTIONS**

2 The United States does not oppose Defendant's request to file further motions if they are based  
3 on new discovery or other information not available to Defendant at the time of this motion hearing.

4 **IV**

5 **CONCLUSION**

6 For the foregoing reasons, the United States respectfully requests that the Court deny  
7 Defendant's motions except where unopposed.

8 DATED: April 8, 2008

Respectfully Submitted,

9 KAREN P. HEWITT  
10 United States Attorney

11 /s/ Paul L. Starita  
12 PAUL L. STARITA  
13 Assistant U.S. Attorney  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 08CR0802-JAH  
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Plaintiff, )  
)  
v. )  
) CERTIFICATE OF SERVICE  
)  
JOSE JUAN FERNANDEZ, )  
)  
Defendant. )  
\_\_\_\_\_ )

IT IS HEREBY CERTIFIED THAT:

I, PAUL L. STARITA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response and Opposition to Defendant's Motions to: (1) compel discovery/preserve evidence; and (2) grant leave to file further motions, together with statement of facts and memorandum of points and authorities on the following by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. David M. C. Peterson, Esq.  
Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

1. N/A.

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 2008.

/s/ Paul L. Starita  
PAUL L. STARITA